IN RE SANPETE BUILDERS (S) PTE. LTD.

HIGH COURT, SINGAPORE
CHAO HICK TIN JC
[COMPANIES WINDING-UP NO. 92 OF 1987]
5 JANUARY 1989

COMPANY LAW: *Winding-up - Failure to pay debt - Insolvency - Whether just and equitable to wind-up - Winding up petition opposed - Claim for liquidated damages - Set off - Arbitration clause - Whether present proceedings come within scope of such arbitration Clause.*

Nakano Singapore (Pte) Ltd. (Nakano) petitioned to wind up Sanpete Builders (S) Pte Ltd. (Sanpete) on grounds that Sanpete was unable to pay its debts.

Sanpete opposed the winding-up petition on the following grounds:

(i) That no payment was due to Nakano.

(ii) That Sanpete was entitled to claim liquidated damages against Nakano.

(iii) Separate and distinct from the claim for liquidated damages Sanpete is entitled to claim damages for breach of contract against Nakano, the petitioner.

(iv) That the disputes arising herein should be submitted for arbitration and as a result Nakano should be precluded from presenting this petition.

Held:

[1] Sanpete has not shown that there are substantial grounds for opposing the petition and further that it has a counter claim based on substantial grounds.

[2] In the circumstances, it is evident that Sanpete is unable to pay its debts within the meaning of s. 254 (1)(e) of the Companies Act and that it is just and equitable that Sanpete be wound up.

[3] The present petition to wind up is not a proceeding which should be submitted for arbitration as provided for by the contract between the parties.

[Order accordingly.]

Cases referred to:

Startup v. MacDonald [1843] 6 M & G 593
British Glanzstoff Manufacturing Co. Ltd. v. General Accident Fire and LIfe Assurance Corporation Ltd. [1913] AC 143
Token Construction v. Charlton Estates [1973] 1 BLR 50
Brightside Kilpatrick Engineering Services v. Mitchell Construction [1973] Ltd [1975] 1 Lloyds Rep 493
Amalgamated Building Contractors Limited v. Waltham Holy Cross Urban District Council [1952] 2 All ER 452
Minister Trust Ltd. v. Traps Tractors Ltd. [1954] 1 WLR 963
Peak Construction (Liverpool) Ltd. v. McKinney Foundation Limited [1969] 69 LGR 1
Community Development Pty. Ltd. v. Engwirda Construction [1969] 120 CLR 455
Re Medisco Equipment Ltd. [1983] BCLC 305
Re King's Cross Industrial Dwellings Co. [1870] 11 Eq 149
Re Great Britain Mutual Life Assurance Society [1880] 16 Ch D 246
Stonegate Securities Ltd. v. Gregory [1980] 1 All ER 241

Re Welsh Brick Industries Limited [1946] 2 All ER 197
Re KL Tractors Ltd. [1954] VLR 505
L & D Audio Acoustics Pty. Ltd. v. Pioneer Electronics Australian Pty. Ltd. [1982] 7 ACLR 180
Re Nima Travel Sdn. Bhd. [1986] 2 MLJ 374
Syd Mannix v. Leserv Construction [1971] 1 NSWLR 788
Sourthern Steel Supplies Pty. Ltd. v. Utility Brute Trailers Pty. Ltd. [1984] 2 ACLR 686
Cardiff Preserve Coal & Coke Co. v. Norton [1867] 2 Ch App 405
Processed Sand Pty. Ltd. v. Thiess Contractors Pty. Ltd. [1983] 7 ACLR 956
Frank Hermens (Wholesale) Pte. Ltd. v. Palma Pty. Ltd. [1985] 10 ACLR 257
Buying Systems (Aust) Pty. Ltd. v. Tien Mah Litho Printing Co. Pte. Ltd. [1986] 10 ACLR 503

Legislation referred to:
Companies Act [Sing], s. 254(1)(e), (2)(a), (c)

Other sources referred to:
Keating on Building Contracts [4th Ed.] pp. 163-4
Macpherson on Company's Liquidation, 3rd Edn., on p. 54
Halsbury's Laws of England (4th Ed.,) Vol. 7, para. 999
8 *Adelaide Law Review* at p. 61

For the petitioning creditor - Kelvin Chia
For the respondent company - Harry Elias (Yang Lih Shying with him)

JUDGMENT

Chao Hick Tin JC:

This is a petition by Nakano Singapore (Pte) Ltd. (Nakano) to wind up Sanpete Builders (S) Pte Ltd. (Sanpete) on three grounds:

(i) Sanpete has failed to pay a debt of $4,149,788.35 demanded by Nakano in their statutory notice dated 23 August 1986.

(ii) In any event, Sanpete is insolvent and unable to pay its debts.

(iii) It is just and equitable that Sanpete be wound up.

This petition is opposed by Sanpete. However, there are no other creditors of Sanpete which either support or oppose the petition.

First let me set out briefly the background to the case. Sanpete was the main contractor for an Urban Redevelopment Authority (URA) project called the "People's Park Chinatown Centrepoint" which was under development by the People's Park Chinatown Development Pte Ltd. (PPCD) under a contract entered into between Sanpete and PPCD dated 16 July 1984. Subsequently Sanpete entered into a sub-contract dated 14 January 1985 with Nakano. By Clause 2(1) of that sub-contract Nakano was appointed as the main sub-contractor for "the whole of the works, plant, equipment, goods, materials and obligations to be carried out, supplied or completed with, under... the main contract." Under the terms of the sub-contract, Nakano was to complete the works by 25 July 1986.

On 5 September 1985, an accident occurred at the worksite due to the collapse of the scaffolding. It caused the death of three workers. Sixteen others were injured. As a result on 6 September 1985 the Factory Inspector of the Ministry of Labour issued a stop work order. All works on site came to a halt. This order was only lifted on 30 September 1985 - a loss of 24 days. On 11 August 1986, Nakano pleaded guilty to three charges under the Factories Act 1973 and was accordingly convicted and sentenced.

a Sanpete alleged that following the accident on 5 September 1985, Nakano did not proceed with the work with due diligence. At a site meeting on 8 July 1986 it was minuted that the works were 343 days behind schedule. On 25 July 1986, the architect granted an extension of six months with effect from that day to complete the works.

b In the meantime and pursuant to the main contract, interim certificates were issued by the architect. Nakano claims payment of the sum of $3,166,544.84 based on certificate Nos. 11-20 as follows:

Architect's Certificte No	Date Due	Amount
11	11 August 1985	S$651,203.75
12	15 September 1985	800,857.30
c 13	16 October 1985	290,572.29
14	24 November 1985	555,651.90
15	15 December 1985	15,696.00
16	16 January 1986	341,072.10
17	21 February 1986	101,721.60
18	17 March 1986	183,934.80
d 19	19 April 1986	52,522.20
20	15 May 1986	173,322.90
		=========
		S$3,166,554.84

e In addition Nakano also claims a sum of $983,223.52 being accrued interest due pursuant to Clause 3 of part 2 of the schedule to the sub-contract in respect of the deferred payments due on architect's certificate Nos. 4 to 12. The breakdown of this claim for interest is set out in paragraph six of the amended petition.

f On 23 August 1986, through its solicitors M/s. Chor Pee & Co., Nakano issued a notice in pursuance of s. 254(2)(a) read with s. 254(1)(e) of the Companies Act demanding payment from Sanpete of the total sum of $4,149,778.35 within 21 days from the date thereof. No payment was made by Sanpete in response to the notice. Nor was any arrangement made to secure or compound for it.

g On 29 August 1986, PPCD was wound up by an order of Court in companies winding up 301/86 pursuant to a creditor's petition. On 16 September 1986, Sanpete, in accordance with Clause 26(1) of the main contract, gave notice of termination to PPCD. On 4 October 1986, Sanpete, pursuant to Clause 11(4) of the sub-contract, gave notice of termination to Nakano.

The present petition was filed by Nakano on 18 February 1987. The petition was amended pursuant to an order of Court made on 22 January 1988 to include another ground based on the general insolvency of Sanpete.

Sanpete's Grounds to oppose Petition

h The grounds advanced by Counsel for Sanpete to resist this petition may be put under the following heads:

(i) No payment is due to Nakano under architect's certificate Nos. 11 to 20.

(ii) Sanpete is entitled to claim liquidated damages against Nakano for delay and to set those off against payments due to Nakano under the certificates.

i (iii) Sanpete is entitled to claim against Nakano for damages for breach of contract.

(iv) Clause 18 of the sub-contract provides for the submission of disputes between the parties to arbitration and accordingly, Nakano is precluded from presenting the present petition.

Two other grounds were also raised in the affidavits filed on behalf of Sanpete:

(i) The fact that an earlier bankruptcy petition was filed by Nakano, which was subsequently withdrawn; and,

(ii) the entitlement by Sanpete to set-off certain amounts which were due from Nakano to Sanpete on account of site expenses.

At the hearing before me, Counsel for Sanpete indicated that it would not be pursuing these two grounds. I will now proceed to deal with each of the four main grounds *seriatim.*

Payments Due under Architect's Certificates.

Under the terms of the sub-contract, payment by Sanpete to Nakano for works done is based on 85% of the value certified by the architect pursuant to the main contract. However, in respect of the first twelve certificates of the architect, the sub-contract provides for a scheme of deferred payment. Under that scheme Sanpete is required to furnish promissory notes for the sums due and is to pay interest for the deferred payments. I think it is important for me at this juncture to set out in full the relevant provisions of the sub-contract governing payments:

Clause 12(2) and (3) of Sub-Contract

2. The value of the first twelve (12) certificates (hereinafter called "the deferred payments") issued or to be issued by the architect under the main contract less the agreed deduction of 15% shall be deferred and paid in the manner stated in Part II of the schedule hereto and save as aforesaid the sub-contractor will (unless the schedule hereto provides to the contrary) be paid the value of the said works as certified by the architect less the agreed deduction of 15% within fourteen (14) days commencing from the expiry date of each period for honouring certificates as provided in condition 30 of the conditions to the main contract following certification by the architect. (Emphasis added)

3. The contractor shall notwithstanding anything in this sub-contract be entitled to deduct from or set off against any money due or to become due from him to the sub-contractor (including any retention money) any sum or sums which the sub-contractor is liable to pay to the contractor under this sub-contract.

Part II of Schedule to Sub-contract

1. Payment of the first twelve (12) architect's monthly certificates to be issued by the architect under the main contract shall be deferred for a period not exceeding twelve (12) months commencing from the expiry date of each period for honouring certificates as provided in condition 30 of the conditions to the main contract plus fourteen (14) days.

2. Within fourteen (14) days of receipt by the contractor of each of the first twelve (12) architect's certificates as aforesaid the contractor shall issue and deliver to the sub-contractor a promissory note (hereinafter called "the note") for the amount certified by the architect in the said certificate (less 15% as aforesaid) guaranteed by an insurance company, bank or other financial institution...

3. The deferred payment shall carry interest at 12% per annum from the expiry date of each period for honouring certificates...

4. Upon the maturity of the notes, payment shall be made forthwith by the contractor upon presentation and delivery of the relevant note.

There were delays in the issue by Sanpete of the promissory notes in respect of the first ten certificates. Further, in respect of certificate Nos. 11 and 12, to date no promissory note has yet been issued. Payments on the first ten certificates have all been paid except for the interest accrued on certificate Nos. 4 to 10. It is not disputed that the architect has issued certificate Nos. 11 to 20. The argument that is being advanced on behalf of Sanpete is that as the certificates issued by the architect are not in favour of Nakano but in favour of Sanpete, there is therefore no payment due from Sanpete to Nakano. In my judgment there is no merit at all in this argument. Clause 12(2) and para. 2 of part II of the schedule quoted above expressly provide that payment to Nakano would be based on the certificates issued by the architect pursuant to the main contract, less 15%.

There are two further related arguments advanced by Sanpete. The first is that as they have not issued a subsidiary certificate in favour of Nakano, Nakano is not entitled to any payment under the certificates issued by the architect. The second is that in respect of certificate Nos. 18 - 20, Sanpete has yet to submit the certificates for payment of PPCD.

I would observe that there is no requirement in the sub-contract that a subsidiary certificate need be issued by Sanpete before payment is due to Nakano. Sanpete argues that in respect of the first ten certificates there was the practice of issuing subsidiary certificates. In my view this practice cannot alter the terms of the sub-contract. More importantly, I am surprised to hear Sanpete relying on its own default in denying what is due to Nakano. Similarly, I do not see how a default by Sanpete to present certificates to PPCD for payment should entitle it to deny what is due to Nakano. I must stress that nowhere in the sub-contract is it provided that payment by Sanpete to Nakano is dependant upon Sanpete presenting the architect's certificates to PPCD, although I recognise that under Clause 30(1) of the main contract, Sanpete must present certificates to PPCD before PPCD is obliged to pay Sanpete. Clause 12(2) clearly provides that in respect of each certificate, Sanpete will pay Nakano "within 14 days commencing from the expiry of each period for honouring certificates as provided in condition 30 of the conditions to the main contract **following certification** by the architect"; the Clause does not provide "following presentation of certificates by Sanpete to PPCD."

In any event, as on 28 February 1986, certificate Nos. 1 - 18 had already been presented for payment - see letter of that date from Sanpete to PPCD. Further, from the statutory declaration as to proof of debt filed by Sanpete on 17 March 1987 in the winding-up proceedings of PPCD, it is clear that certificate Nos. 1 - 20 must have all been presented by Sanpete to PPCD for payment. No evidence has been placed before me by Sanpete to show otherwise.

Liquidated Damages for Delay

Sanpete claims that pursuant to Clause 10(2) and 12 (3) of the sub-contract, it is entitled to deduct from or set-off against any money due to Nakano any sum or sums which Nakano is liable to pay to Sanpete. Sanpete says that by virtue of the delay in the execution of the works, Nakano is liable for liquidated damages at the rate of $45,000 a day. It bases this claim on the fact that as on 8 July 1986, the works were noted by the architect to be 343 days behind schedule. Taking into account the six months extension granted by the architect on 25 July 1986, the works were at that point still behind schedule by 163 days. That being the case, Sanpete is entitled to claim for liquidated damages and set it off against the amount due under the certificates from Sanpete to Nakano. On this basis Sanpete says it has a claim of $7,335,000 as liquidated damages against Nakano which is far in excess of the amount due to Nakano from Sanpete.

This claim by Sanpete raises an important issue: can a party claim liquidated damages in a situation where the building contract has been terminated and the date for completion, as extended, has yet to arrive and where there is no certificate from the architect certifying that the works ought reasonably to have been completed by the prescribed date. In this regard I should now set out Clause 10(2) of the sub-contract which reads:

> (2) If the sub-contractor fails to complete the said works by the date or dates stated in the appendix to the main contract or within any extension of time granted to the contractor under the main contract and the architect certifies in writing that in its opinion the same ought reasonably so to have been completed, then the sub-contractor shall pay or allow to the contractor a sum calculated at the rate specified in the said appendix as liquidated and ascertained damages for the period during which the said works shall so remain or have remained incomplete, and the contractor may deduct such sum from any monies due or to become due to the sub-contractor under this sub-contract.

In view of the fact that the sub-contract was terminated by Sanpete on 4 October 1986, it seems clear to me that the liquidated damages Clause can have no application as the Clause talks about "if the contractor fails to complete the said works by the date -...-" That is a condition precedent which must be satisfied before liquidated damages may be imposed. A contractor has until the last hour of the day fixed for completion in which to finish the works: see *Startup v. MacDonald* [1843] 6 M & G 593. In addition, it is equally clear from Clause 10(2) that one other requirement must also be satisfied before liquidated damages may be imposed i.e., a certificate from the architect that the works ought reasonably to have been completed on the extended date, that is, 25 January 1987.

Keating on Building Contracts (4th Edn.) states at p. 163-4:

> If the contract is brought to an end by determination or otherwise, then *prima facie* all future obligations cease and no claim can be made for liquidated damages **accruing after determination**. But there may be some special Clause which has the effect of keeping the provision for payment of liquidated damages alive although the work has been taken out of the hands of the contractor.

As on the date of termination of the sub-contract, no liquidated damages have accrued to Sanpete because the date for completion has yet to arrive. There is nothing in the sub-contract which preserves the right to liquidated damages after termination.

In *British Glanzstoff Manufacturing Co. Ltd. v. General Accident Fire and Life Assurance Corporation Ltd*. [1913] AC 143 the House of Lords held that a Clause on liquidated damages applied only where the contractors had completed the contract and did not apply where the control of the contract had passed out of their hands.

In *Token Construction v. Charlton Estates* [1973] 1 BLR 50 where a similar Clause was in issue, Roskill LJ said at p. 58:

> It seems to me clear that two conditions must be shown by the building owners to have been fulfilled before the right of set-off can be exercised by them. The first is that the contractors failed to complete the works 'within any extended time fixed under Clause 2(e) of these conditions'. The second is that the architect has certified in writing that in his opinion 'the same', that is to say the works 'ought reasonably so to have been completed'. Only upon proof by the building owners of the due fulfillment of these two conditions can they claim to set-off the liquidated and ascertained damages at the stated rate of 800 pounds a week against monies otherwise payable by them to the contractors under this contract.

The cases *Brightside Kilpatrick Engineering Services v. Mitchell Construction* [1973] Ltd [1975] 1 Lloyds Rep 493 and *Amalgamated Building Contractors Limited v. Waltham Holy Cross Urban District Council* [1952] 2 AllER 452 also establish the principle that the issue of an architect's certificate is a condition precedent to any right in an employer or a contractor to claim liquidated damages for delay from a contractor or sub-contractor respectively. Counsel for Sanpete sought to argue that para. 3.3 of the minutes of the site meeting on 9 July 1986 where it was stated "contractor is 343 days behind schedule on the critical activities which run through area C of the construction for phase I" could be deemed to be a certificate. I am unable to accept this contention. For a document to constitute a certificate it must contain a binding decision and be unambiguous and readily understandable: see *Minister Trust Ltd. v. Traps Tractors Ltd.* [1954] 1 WLR 963. As Edmund Davies LJ stated in *Token Construction v. Charlton Estates* [1973] 1 BLR 50 at 52:

> While no set form of certificate is provided, unlike that under Clause 21(a) and (b), it must clearly appear that the document relied upon is the physical expression of a certifying process. One should, therefore, have some regard to the factors of 'form', 'substance' and 'intent' of which Mr. Justice Devlin spoke in the admittedly different circumstances of *Minister Trust Ltd. v. Traps Tractors Ltd.* or, to adopt a passage in *Hudson* (10th Edn., p. 479), the document should be 'the expression in a definite form of the exercise of the opinion -...- of the ... architect ... in relation to some matter provided for by the terms of the contract'. And, as Mr. Garland accepted, it must be free from ambiguity.
>
> What the architect is called upon by Clause 16 to certify is his 'opinion' that 'the works ought reasonably to have been completed' by the original date specified 'or within any extended time fixed under Clause 2(c) of these conditions'.

Accordingly, I am of the opinion that Sanpete has no claim against Nakano for liquidated damages. Though this would suffice to dispose of this point I ought to mention that on the evidence before me, it is clear that much of the delay in the construction schedule was caused by PPCD in changing the designs and materials specified, the delay by PPCD in the award of nominated sub-contracts and the delay by the consultants in giving instructions and furnishing drawings/plans requested by Nakano. The architect has granted six months' extension for the delay in the award of nominated sub-contracts. But no extension has yet been granted for delays caused by variations made by PPCD. If due to the fault of an owner, a contractor is unable to adhere to the date specified for completion, then unless a prior extension is granted by the architect to take into account the delays so caused by the owner, the contractor would not be bound to pay any liquidated damages. This was stated by Salmon LJ in *Peak Construction (Liverpool) Ltd v. McKinney Foundation Limited* [1969] 69 LGR 1 at 12:

> ... it is clear that even if Clause 23 had provided for an extension of time on account of delay caused by the (employer), the failure in this case of the architect to extend the time would be fatal to the claim for liquidated damages. There had clearly been some delay on the part of the corporation. Accordingly, as the architect has not made 'by writing under his hand such an extension of time', there is no date under the contract from which the defendant's liability to pay liquidated damages for delay can be measured. And therefore none can be recovered.

General Damages for Breach of Contract.

Under this head Sanpete contends that, separate and distinct from the claim for liquidated damages, it is entitled to claim for general damages for breach of contract in that Nakano wilfully or negligently allowed the works to be delayed. In the alternative, it says that it is entitled to an indemnity from Nakano in respect of any liability which Sanpete may incur to PPCD.

It seems to me that the only single incident upon which fault could squarely be placed on Nakano for the delay in the works is the accident on 5 September 1985 which led to the stoppage of work for 24 days. There are also other allegations that Nakano had not been providing the necessary man-power to proceed with the work diligently, particularly after April 1986. As mentioned above, a contractor or sub-contractor has until the last day fixed for completion in which to finish the work that he has undertaken. In any event, on the facts before me, it is clear that over the entire period of construction before termination, there were variations ordered and delays in the award of sub-contracts. There were also delays in the giving of instructions or the furnishing of necessary drawings requested by Nakano. In some instances Sanpete, and consequently Nakano, had been requested by the consultants to "hold" specific works for one reason or another. Sanpete itself has made numerous requests to the architect for extension of time for various stated reasons: all these are shown in Exhibits "TY6" and "TY7" to affidavit of Teruji Yamada filed on 14 September 1987. There were also breaches of obligations on the part of Sanpete in not furnishing the promissory notes in respect of certificate Nos. 11 and 12 or paying the sums due to Nakano in respect of the later certificates issued by the architect.

In this regard I note from the letter written by the architect dated 28 July 1988, that

> vigorous attempts (were made) by the developer in changing the design and materials specified and the delay in the award of nominated sub-contracts contributed substantially to the delay of the project.

He also confirmed that the extensions of six months granted to the contractor was granted for delay arising on account of delay in making timely awards of nominated sub-contracts. This confirmation is consistent with the correspondence: see the letter of 15 January 1986 from Sanpete to the architect and the architect's telex of 25 July 1986 granting the six-months extension. The architect further stated that if the contract had not been prematurely terminated and the contractor could show other causes or grounds of delay that were not due to his fault, he would have granted further extension of time once the architect was satisfied that the claims for extension were valid. On the facts it seems to me quite clear that if the main contract and the sub-contract had not been prematurely terminated, the architect would be obliged to grant further extension for various other causes of delay not due to the fault of Nakano as set out in the numerous letters written by Sanpete to the architect exhibited as "TY7".

Counsel for Sanpete contended that I should not take into account what was stated by the architect in this letter of 28 July 1988 as the architect was *functus officio*. I do not accept that submission. By writing that letter the architect was not seeking to exercise his functions under the main contract or the sub-contract. He was merely clarifying a sentence in the minutes site meeting held on 8 July 1986. This he was entitled to do for the benefit of this Court.

In any event, under the law it is quite clear that for a person to claim unliquidated damages under contract there must be proof of loss. I do not see any loss which Sanpete has suffered. Neither has it furnished any proof of any such loss. There is no particularization or quantification of loss. The evidence shows that the URA is not making any claim against PPCD and has in fact waived whatever claim URA has against PPCD. Neither has any evidence been produced to show that PPCD has made any claim against Sanpete for unliquidated damages. Counsel for Sanpete said that the entire arrangement with Nakano allows a 15% profit to Sanpete. But I fail to see how Nakano can be responsible for that loss of profit. Nakano did not terminate the sub-contract; neither did it cause the winding-up of PPCD.

If Sanpete really has *bona fide* claim against Nakano for damages, then it would have held back the performance bond instead of returning it to Nakano as requested. It is of significance that no attempt was made by Sanpete to enforce the bond. Sanpete says it returned the bond out of goodwill. But if Nakano was the party at fault it hardly seems logical for Sanpete to be the one to show goodwill. It should be for Nakano to do that.

As regards the alternative claim for an indemnity, no evidence has been tendered by Sanpete to show that the liquidator of PPCD is claiming against Sanpete for unliquidated damages on account of delay in the works. Though the liquidator did, in a letter dated 22 June 1987, claimed liquidated damages against Sanpete, there has since been no follow-up action. In any event, for the same reasons discussed above, PPCD cannot claim liquidated damages against Sanpete. In the meantime, Sanpete has put in its proof of debt for a sum of $35,334,800.38 which appears to have been accepted by the liquidators or at least nothing has been placed before me to show that the claim has been rejected. According to Sanpete, PPCD has not been paying Sanpete since certificate No. 2 of the architect (except for part of certificate Nos. 2 and 3). In view of this, I do not see on what basis can PPCD claim unliquidated damages from Sanpete on account of delay, if any. PPCD could not be heard to complain that the works had not been progressing as scheduled.

Arbitration

The submission made under this head is that as there is a dispute between Nakano and Sanpete, the dispute should be submitted to arbitration in accordance with Clause 18 of the sub-contract. I think in order to appreciate whether there are merits in this argument, I should set out the relevant portion of Clause 18(1) which reads:

> 1. Provided always that in case any dispute or difference shall arise between the parties hereto either during the progress or after the completion or abandonment of the said works as to the construction of this sub-contract or as to any matter or thing of whatever nature arising thereunder or in connection therewith -...- then such dispute or difference shall be and is hereby referred to arbitration and the final decision of such a person to be agreed between the parties -...-

All this Clause means is that instead of a dispute being submitted to the ordinary Courts of law the parties have agreed that it be submitted to arbitration. But the real question is still whether the contention by Sanpete that it is entitled to claim liquidated damages or unliquidated damages and set them off against the moneys due to Nakano under the sub-contract is a *bona fide* claim based upon substantial grounds which ought to go to arbitration under Clause 18. I do not think this argument based on Clause 18(1) adds anything more to what has already been discussed under the preceding three heads.

I would hold that in so far as the present petition is concerned it is not a proceeding which comes within the scope of Clause 18(1). This point was clearly decided by the Australian High Court in *Community Development Pty Ltd. v. Engwirda Construction* [1969] 120 CLR 455. I will, in this regard, only quote the judgment of Owen J at p. 460 where he said the following:

> The first submission made on behalf of the appellant was that the winding-up petition should have been dismissed because, by presenting it, the respondent had commenced an action upon "a dispute or difference" arising under the building contract between the parties and by Clause 26 of that contract each of them had agreed that no such action should be commenced until the matter in dispute had been referred to and determined by arbitration in accordance with that Clause. In my opinion this submission fails. It may well be that the presentation of a

> winding-up petition is, in some circumstances, to be regarded as the commencement of an "action" (*Re w Carter Smith; Ex parte Commissioners of Taxation* [1]); but the presentation of this petition was not the commencement of proceedings based upon the building contract or upon a dispute or difference arising under it. The "cause of action" if it may be so described, was that the appellant was unable to pay its debts and that it was just and equitable that it should be wound up.

It is important to bear in mind that in winding-up proceedings one is considering always a class remedy and not a private *lis* between the petitioner and the company: see *Re Medisco Equipment Ltd.* [1983] BCLC 305.

However, if I should be wrong and this petition is a proceeding within the meaning of Clause 18, then Sanpete should have, at the earliest moment, taken up an application to stay this proceeding. Instead, it has filed affidavits to resist the petition. Sanpete even applied and obtained an order of Court giving it liberty to carry on its normal business operations pending the disposal of the petition. It did not raise this point until the first date fixed for hearing of this petition when the hearing had to be adjourned to allow further affidavits to be filed by the parties. It is clearly too late for Sanpete to rely on Clause 18 to prevent this petition from being dealt with, if that course were available to Sanpete in the first place.

Law Governing this Petition

It is a well established principle that a winding-up petition should not be used as a means to enforce payment of a debt which is *bona fide* disputed. However, the debt must be disputed on some substantial grounds: see *Re King's Cross Industrial Dwellings Co*. [1870] 11 Eq 149 and *Re Great Britain Mutual Life Assurance Society* [1880] 16 Ch D 246 where Jessel MR said at p. 253:

> ... in my opinion it is not sufficient for the respondents, upon a petition of this kind, to say 'We dispute the claim'. They must bring forward a *prima facie* case which satisfies the Court that there is something which ought to be tried, either before the Court itself, or in an action, or by some other proceeding.

It is an abuse of the process of the Court to petition to wind-up a company upon the basis of a debt which is so *bona fide* disputed. This rule is established in *Mann v. Goldstein* [1968] 1 WLR 1091, where Ungoed-Thomas J stated the principle thus at p. 1098-9:

> For my part I would prefer to rest the jurisdiction directly on the comparatively simple propositions that a creditor's petition can only be presented by a creditor, that the winding-up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds) since, until a creditor is established as a creditor, he is not entitled to present the petition and has no *locus standi* in the Companies Court; and that, therefore to invoke the winding-up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the Court.

This statement of the law by Ungoed-Thomas J was cited with approval by Buckley LJ in *Stonegate Securities Ltd v. Gregory* [1980] 1 All ER 241.

Whether a debt is disputed on substantial grounds is a question of fact. The mere fact that unconditional leave to defend an action relating to a debt is granted may not *per se* be sufficient to prevent the making of a winding-up order on the ground that it is a disputed debt: see *Re Welsh Brick Industries Limited* [1946] 2 All ER 197 where Lord Green MR explained (at p. 198) how the Court should deal with the situation:

> I cannot accept the proposition that, merely because unconditional leave to defend is given, that of itself must be taken as establishing that there is a *bona fide* dispute or that there is some substantial ground of defence. The fact that such an order is made is no doubt a matter which the winding-up Court will take into consideration and to which the winding-up Court will in due course pay respect, **but I cannot regard it as in any way precluding a winding-up Judge from going into the matter himself on the evidence before him and considering whether or not the dispute is a** *bona fide* **dispute, or, putting it in another way, whether or not there is some substantial ground for defending the action.** An order, of course, can be made under RSC O. 14, giving unconditional leave to defend on grounds which fall far short of the establishment of a substantial ground of defence to the satisfaction of the Registrar or the master, as the case may be. He may find that there is a keen dispute between the parties and he may find that, on the facts before him, it would not be proper or just to treat that issue as one which he is capable of deciding - whether it is *bona fide* or not - and he may accordingly say: "The facts alleged are quite consistent with it being a *bona fide* dispute: I need not go so far as to find that it is a *bona fide* dispute, but I think that there ought to be leave to defend." Accordingly, in the winding-up Court it seems to me that it must be competent for the Judge, in spite of the fact that unconditional leave to defend has been granted, to go into the evidence which is in fact before him. (emphasis added).

Following from the above, it is clear that a creditor need not come to Court or an arbitrator to collect an undisputed debt or a debt which is not disputed on substantial grounds. *Prima facie*, a creditor who cannot get paid has a right to a winding-up order, whatever may be his other motives.

Similarly when non-payment of a debt is due to a counter-claim, that counter-claim must also be based on substantial grounds for an amount equal to or exceeding the debt: *Re K L Tractors Ltd*. [1954] VLR 505 and *L & D Audio Acoustics Pty Ltd. v. Pioneer Electronics Australian Pty Ltd.* [1982] 7 ACLR 180. In *L & D Audio Acoustics*, McLelland J said at pp.184-5:

> Apart from any question of legal or equitable set-off, the existence of a counter-claim based on substantial grounds for an amount equal to or exceeding the debt the subject of a demand will generally provide reasonable cause for omitting to pay the debt in accordance with the demand.

Applying these principles to the facts of the present case and in view of what I think are the merits on the various points raised by Sanpete as discussed above, I hold that Sanpete has not shown that the sum claimed by Nakano is *bona fide* disputed on substantial grounds or that it has a counter-claim based on substantial grounds. Throughout all the correspondence which has been exhibited what I do see is a reasonably diligent sub-contractor who wished to get on with the work. What I also see is an owner who, to put it mildly, was always slow in making progress payments as certified by the architect and who was very proned to making changes to the works. Because of such delay or inability by the owner in paying Sanpete, Sanpete was thus slow in issuing promissory notes to Nakano and is unable to issue promissory notes for certificate Nos. 11 and 12 and is also unable to pay Nakano for certificate Nos. 13 to 20. But under the sub-contract, Nakano's right to obtain payment from Sanpete is not dependent on Sanpete getting payment from PPCD. Sanpete has not argued that it is only liable to pay Nakano when it gets payment from PPCD. The parties were even concerned about any cash-flow problem of Nakano that they provided for it in Clause 16 of sub-contract. I would also mention in passing that after the statutory notice dated 26 August 1986 was served on Sanpete requiring it to make payments within 21 days, Sanpete did not respond to that notice by disputing the amount claimed by way of set-off or counter-claim. No such evidence was placed before me. In the Malaysian case *Re Nima*

Travel Sdn. Bhd. [1986] 2 MLJ 374 cited by Counsel for Sanpete, the respondent company did reply on the 7th day, after receiving the statutory notice, disputing the debt claimed.

I am conscious that this Court, acting as a Companies Winding-Up Court, should not proceed to try a debt which is disputed on substantial grounds. But in this case I hold that no real grounds exist for Sanpete to dispute the amount claimed by Nakano. Neither is there a *bona fide* counter-claim based on substantial grounds. Accordingly, I am satisfied that Sanpete is unable to pay its debts within the meaning of s. 254 (1)(e) of the Companies Act, read with s. 254(2)(a) and considering the case as a whole I think it just and equitable that Sanpete be wound-up. I would only add that in coming to this conclusion, I have not considered it necessary to rely on any of the alleged admissions made by Sanpete which are disputed by Sanpete on grounds of inadmissibility.

Insolvency under s. 254(2)(c). That should suffice to dispose of this petition. However, in view of the extensive arguments presented to me as to the general insolvency of Sanpete, I feel I ought to say that on the facts before me, I would also hold that it has been proved to my satisfaction that Sanpete is unable to pay its debts within the meaning of s. 254(2)(c) of the Companies Act. The scope of this provision is explained in *Macpherson on Company's Liquidation*, 3rd Edn., on p. 54 as follows:

> The phrase 'unable to pay its debts' which appears in s. 364(2)(c) (the equivalent to our s. 254(2)(c)) is susceptible of two interpretations. One meaning which may properly be attached to it is that a company is unable to pay its debts if it is shown to be financially insolvent in the sense that its liabilities exceed its assets. But to require proof of this in every case would impose upon an applicant the often near-impossible task of establishing the true financial position of the company, and the weight of authority undoubtedly supports the view that the primary meaning of the phrase is insolvency in the commercial sense - that is, inability to meet current demands, irrespective of whether the company is possessed of assets which, if realised, would enable it to discharge its liabilities in full.
>
> From this it follows that insolvency in this form is principally a question of fact, and one which may be established in any number of ways.

Proof that a creditor's debt has not been paid *per se* does not establish an inability to pay debts within the meaning of s. 254(2)(c). The conclusion of insolvency, generally speaking, ought not to be drawn simply from evidence of a temporary lack of liquidity: *Sandell v. Porter* [1966] 115 CLR 666. On the facts now before me as to the financial state of Sanpete, not only are the accumulated losses of Sanpete in excess of its capital, the last statement of accounts filed with the Registry of companies for the period ending 31 August 1985 shows that the assets of Sanpete are really only book debts. The statement of accounts also shows that the then current liabilities exceeded current assets by $733,662. No subsequent statement of accounts has been filed by Sanpete. At the part-hearing in February 1988, Counsel for Sanpete indicated that up-to-date accounts would be filed shortly. But at the resumed hearing in August 1988, that was not forthcoming. The solicitors for the liquidator of PPCD have also written to say that dividends to unsecured creditors are expected to be negligible. The People's Park Chinatown Centrepoint project has been sold for $55 million of which $53 million have to be paid to URA, which is a secured creditor of PPCD.

I have noted that Sanpete has reached a settlement with Mulpha, another sub-contractor, in regard to a judgment which Mulpha obtained against Sanpete. Nevertheless the fact is that the debts due from Sanpete to Nakano have been outstanding for a very long time and have remained unpaid. Case law clearly shows that non-payment of a debt after demand may in appropriate circumstances assist in proving insolvency quite independently of the provisions

of s. 254(2)(a): see *Syd Mannix v. Leserv Construction* [1971] 1 NSWLR 788 and *Southern Steel Supplies Pty Ltd. v. Utility Brute Trailers Pty Ltd.* [1984] 2 ACLR 686. There is no indication that fresh capital will be injected into Sanpete or that payments will be received by Sanpete from any source to enable it to discharge its debts to Nakano. Sanpete is not even able to furnish promissory notes for certificate Nos. 11 and 12 (long overdue since 1985) in respect of which payments no deduction (except those listed which are not applicable) is permitted under Clause 12(4) of the sub-contract.

Having regard to all the circumstances of the case, it seems to me clear and I am satisfied that Sanpete is insolvent and unable to pay its debts within the meaning of s. 254(2)(c).

Validity of Statutory Notice

There is just one other point which has been argued by Sanpete and which I think I ought to mention and it is this: is a statutory notice under s. 254(2)(a) still valid if part of the amount claimed is not disputed (and which exceeds the prescribed minimum of $2,000) but the other part is *bona fide* disputed on substantial grounds? Sanpete contends that certificate Nos. 18 - 20 have not been presented by Sanpete to PPCD for payment and applying Clause 30 of the main contract and Clause 12(2) of the sub-contract, no payment is therefore due to Nakano on those three certificates. Accordingly, the statutory notice has claimed an amount in excess of what is undisputedly due from Sanpete to Nakano and is bad. Sanpete says that failure to pay the sum claimed in these circumstances does not amount to 'neglect' under s. 254(2)(a).

In view of what I hold above as to the effect of non-presentation by Sanpete of the interim certificates to PPCD for payment, this question really does not arise. There is also evidence that Sanpete has, in fact, tendered the certificates to PPCD for payment and I do so hold. If indeed the question does arise for consideration, I recognise that there are two lines of authorities on point. Before referring to those cases, I should, for convenience, at this time set out s. 254(2) which reads:

> (2) A company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding $2,000 then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;
>
> (b) execution or other process issued on a judgment, decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
>
> (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company.

In a decision of the House of Lords, *Cardiff Preserve Coal & Coke Co v. Norton* [1867] 2 Ch App 405, this point was decided in the affirmative where at p. 410, Lord Chelmsford LC said:

> It was contended that the winding-up order was bad because Mr. Hill had demanded a sum of 628 pounds, and it appeared that he was entitled only to 411 pounds 7s 9d; and the 67th and 68th sections of the Act make a company liable to be wound up only when a demand is made of a certain sum, and the company neglect to pay such sum, which in this case they were not bound to pay. But the liability of a company to be wound up under these provisions

> arises when a creditor, to whom the company is indebted above 50 pounds, serves a demand requiring the company to pay the sum so due, and the company for a certain time neglect to pay such sum. In this case there was a debt of more than 50 pounds due to Mr. Hill. He made, it is true, a demand upon the company for payment of more than was due, but of course the amount due was known to the company, and was included in the demand, and the company neglected to pay "such sum", which means not the sum demanded, but the sum due, which they might have paid, and so have prevented the order being made. The construction contended for would make every winding-up order bad where the creditor had demanded the smallest sum above what was actually due to him.

The decision in *Cardiff Preserve Coal* was applied and followed in subsequent cases including the Australian cases *Re Convere Pty Ltd*. [1976] VR 345, *Re Gem Exports Pty Ltd.* [1984] 2 ACLC 229 and *Re Pardoo Nominees Pty Ltd*. [1987] 11 ACLR 573. In footnote (13) to para. 999 of *Halsbury's Laws of England* (4th Edn.,) Vol. 7, the decision in *Cardiff Preserve Coal* is quoted to support the proposition that a demand in excess of what is due is a valid statutory demand.

However, the New South Wales Supreme Court refused to follow the decision in *Cardiff Preserved Coal* in *Processed Sand Pty Ltd v. Thiess Contractors Pty Ltd* [1983] 7 ACLR 956 and *Frank Hermens (Wholesale) Pty Ltd. v. Palma Pty Ltd*. [1985] 10 ACLR 257. In *Buying Systems (Aust) Pty Ltd. v. Tien Mah Litho Printing Co. Pte Ltd.* [1986] 10 ACLR 503 the learned Judge approved the decision in *Processed Sand* but said that "how far it is to apply when there is an error *de minimis* has yet to be considered".

In *Processed Sand* Waddell J felt that the view expressed in *Cardiff Preserved Coal* is contrary to the literal meaning of the provision and said at p. 961:

> Its effect is to provide a statutory admission that a company is unable to pay its debts. One would expect such an admission to be created only if the amount claimed by the notice of demand and not paid or secured or compounded for to the reasonable satisfaction of the creditor was an amount either admittedly due or one as to which there was no real dispute as to liability. It would seem arbitrary and unjust to create an admission arising on failure to pay etc. a debt, a part of which was not due.

As stated above, this issue does not arise here and I need not decide it though I would be inclined to take the view that what was stated in *Cardiff Preserved Coal* is the correct interpretation of the law and that so long as a debtor refuses to pay a sum which is not in dispute and that sum is in excess of the minimum prescribed in s. 254(2)(a), there is neglect to pay within the meaning of that provision. The decision in *Processed Sand* seems to have proceeded on a wrong premise and this was explained by Cosgrove J in *Re Pardoo Nominees Pty Ltd*. at pp. 575 and 576 as follows:

> If the word "deemed" was used to create a statutory fiction then strict proof would be required of the basic facts which must exist in order to prove the existence of the 'fictional fact'. But if the word is used to indicate that the draftsman has listed the available avenues whereby the requisite conclusion may be reached (see Cave *J* in *R v. Norfolk County Council* [1891] 60 LJQB 379 at 38) interpretation of the section is not so constrained, and one may approach it in a practical rather than an exacting frame of mind. In the case of the sub-section under review, it is plain that para. (c) certainly, and, almost as certainly, para. (b) contain not the slightest suggestion of fiction. If the facts in para. (c) are established, the requisite conclusion is reached without any further step. The "deeming" adds nothing to it. If the facts in para. (b) are established the requisite conclusion would surely follow without any reference to "deeming". Proof of the facts in para. (a) does not lead inexorably to the requisite conclusion but, in the absence of contention, would go a long way towards it. Some help is needed from the deeming provision but only to the extent that the words "deemed to be" are interpreted

as meaning "shall be sufficient proof that the company is". I rule, therefore, that the conclusion stated at the end of the sub-section is not a statutory fiction, and that the purpose of the sub-section is to list methods of proof.

The more restrictive interpretation of the relevant sub-section (that any error vitiates the demand as a statutory basis for the requisite conclusion) stems from a decision of Waddell J in the Equity Division of the NSW Supreme Court: *Processed Sand Pty Ltd. v. Thiess Contractors Pty Ltd; Breen Holdings Pty Ltd. v. Thiess Contractors Pty Ltd.* [1983] NSWLR 384. His honour's decision is based quite specifically on a literal interpretation of para. (a) of sub-section (2) of s. 364 and, it seems to me, on his opinion that the word "deemed" was used for the purpose of creating of a statutory fiction: see 386 E-F and 390 A-D. He also refers to a failure to pay being "a statutory admission": 389E. I do not follow his Honour's reasoning on the latter point, and for the reasons I have given, I do not interpret the word 'deemed' as he does.

It seems to me that the interpretation to be given to the expression "the sum so due in s. 254(2)(a) is crucial. In this regard, I find the arguments of a writer, J F Corkery, in an article entitled "Winding Up by the Court for inability to pay debts: the Court's exercise of its discretion" published in 8 *Adelaide Law Review* at p. 61 (this publication is not available but the article is quoted in *Re Gem Exports Pty Ltd*.) somewhat persuasive when he states:

Surely the phrase does not mean or suggest that the company's total indebtedness to the creditor, or even one distinct debt, must be stated in the demand. Fixing an exact quantum will often be almost impossible, quite frequently it may be patently obvious that a large sum - much more than $1,000 - is owed by the company. Why should a creditor not be able, at least for the purpose of serving a demand and getting the liquidation under way, to demand an amount that turns out to be more or less than is owing to him, as long as at least $1,000 is incontestably due and payable? What happens in a current account situation where a company owes a creditor what amounts to a series of debts and the creditor issues a demand for only some of those debts? Is such a demand invalid?

The author then went on to say:

The present wording of the para. (a) is susceptible to both a narrow and wide construction: i.e., either 'the exact sum due' or 'any sum exceeding $1,000'. The use of the definite article 'the' before 'sum' in para. (a) is simply insufficient evidence of the legislature's intention to narrow the construction; nor is such a construction called for on an ordinary reading of the provision. In para. (a) the phrase 'the sum so due' refers back to the antecedent words 'a sum exceeding $1,000 then due'. Neither the exact sum due nor a single specific debt is required: merely a sum in excess of $1,000 -...-

Obviously if in a particular case the amount demanded is large and much of that amount is *bona fide* disputed on substantial grounds, leaving only a small amount (though exceeding the prescribed minimum amount of $2,000) not disputed, the Court might very well in the circumstances, in the exercise of its discretion, refuse to grant a winding-up order under s. 254(2)(a). Each case would have to be decided on its merits.

Winding Up Order

In the result, I order that the company, Sanpete Builders (S) Pte Ltd., be wound up; that Mr. Jamshid Medora be appointed as the liquidator of the company; and that the costs incurred by the petitioner be paid out of the assets of the company.

Also found at [1989] 1 CLJ 562